Before the Federal Communications Commission Washington, DC 20554

In the Matter of)
)
Amendment of Parts 1, 21, 73, 74 and 101 of the) WT Docket No. 03-66
Commission=s Rules to Facilitate the Provision of) RM-10586
Fixed and Mobile Broadband Access, Educational)
and Other Advanced Services in the 2150-2162)
and 2500-2690 MHz Bands)
Part 1 of the Commission=s Rules B Further) WT Docket No. 03-67
Competitive Bidding Procedures)
Amendment of Parts 21 and 74 to Enable) MM Docket No. 97-217
Multipoint Distribution Service and the)
Instructional Television Fixed Service)
Amendment of Parts 21 and 74 to Engage in Fixed)
Two-Way Transmissions)
Amendment of Parts 21 and 74) WT Docket No. 02-68
of the Commission=s Rules with Regard to) RM-9718
Licensing in the Multipoint)
Distribution Service and in the)
Instruction Television Fixed Service for the)
Gulf of Mexico)
Gulf of Mexico)

To: The Commission

COMMENTS OF AD HOC MMDS LICENSEE CONSORTIUM

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SUMMARY

The Ad Hoc MMDS Licensee Consortium ("AMLC") is a group of small independent MDS and MMDS licensees. The Comments submitted here urge the Commission to restructure the ITFS/MMDS band along the lines proposed by the Wireless Coalition, with certain key improvements. The highlights of the Comments are:

- 1. The band should be de-interleaved and height/power levels adjusted to permit cellular low power operations along with limited high power operations. Some MDS spectrum should be included in both the upper and lower bands to facilitate the provision of FDD service.
- Outdated and unnecessary reports and requirements for MDS and MMDS licensees should be abolished.
- 3. Usage of ITFS channels should be limited to genuine educational use. ITFS bandwidth not so used within one year of the effective date of the new rules should be converted to MDS use and auctioned off along with presently vacant ITFS spectrum. To allow for future ITFS needs, successful bidders for that spectrum should be required to make available up to 20% of their spectrum for genuine educational purposes, as DBS and cable companies are required to make available a portion of their capacity for public, educational and governmental purposes.
- 4. The reclaimed or vacant ITFS spectrum should be auctioned exclusively to commercial filers on a BTA by BTA basis consistent with the auction of MMDS spectrum.
- 5. All vacant and occupied ITFS and MMDS licenses would be auctioned in a single two-sided auction. Incumbents could bid with virtual dollars to retain their licenses, but if they are outbid they would receive the bid amount and forfeit their license. Any licensees retaining their licenses would be grouped together in the band to make more contiguous bandwidth

available to the auction winner. This method allows prospective users of the spectrum the best and quickest method of getting clear title to a large swath of unencumbered spectrum. ITFS licensees who determine that immediate cash would be better for their educational goals than long-term licenseeship could cash out, and their spectrum would then be opened up to others. There would be no transition process since all licenses would be reconfigured at the same time and licensees would then have the remaining term of their licenses to operate under the new frequency plan.

- 6. Section 21.303 of the rules should be abolished in favor of simply requiring substantial service by licensees during the course of their license term, as contemplated by the more modern, less "command and control," regulatory model. In addition, installment payment obligations should be suspended for a period of two years while the new frequency allocation is implemented.
- 7. Existing ITFS and MDS and MMDS leases should not be permitted to continue for more than three years or to be renewed in light of the dramatic overhaul of the channel plan.

 Lessees should be required to put leased channels to use rather than warehousing spectrum.

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To: The Commission

COMMENTS OF THE AD HOC MMDS LICENSEE CONSORTIUM

The instant proceeding represents an enormous opportunity for MDS licensees to be able to realize, at long last, the true potential of this valuable spectrum. The Ad Hoc MMDS Licensee Consortium ("AMLC") is a group of MDS and MMDS licensees who have held their licenses for many years. It includes Channel 1 and 2 licensees who were involved in the industry from its inception, licensees who acquired MMDS licenses in lotteries or the aftermarket, and BTA licensees who bought their licenses in the 1996 auction. This group does not include the

"Big Three" MMDS licensees (Sprint, WorldCom/Nextel, or Nucentrix), yet its constituents are part of that large group of small, independent operators which makes up the vast majority of MDS licensees in the country, although to date they have been a relatively silent majority.

The present rulemaking was initiated at the behest of ITFS operators, the Catholic Television Network, and the Wireless Communications Association International ("Wireless Coalition"). While this initiative was useful and valuable, it is important to recognize that there are other voices within the wireless communications community. The educational community, of course, has its own perspectives on the future of MMDS and ITFS. And the WCAI, while purporting to represent the MDS "industry," understandably approaches issues primarily from the standpoint of a handful of its largest members and contributors. The viability of future operations in the MMDS/ITFS band are very much at stake for the many smaller licensees who have been delivering independent MDS service to customers for decades under very trying conditions. The AMLC does not purport to speak for all of the independent MDS licensees, but it is comprised of a representative subset. We feel that it is important for the Commission to have input from this important and unrepresented segment of the industry, so we are offering these comments on the various options which the Commission is considering.¹

I. BACKGROUND

¹AMLC is distinct from the Independent MMDS Licensee Coalition, although the groups support many of the same reforms proposed in the *NPRM*.

In 1983, many small business entities rallied to the Federal Communications Commission's invitation to file for licenses to transmit television signals under the Multichannel Multipoint Distribution Service (MMDS)² mantle. Many of them were heartened by the government's commitment to providing a highly promising new venue for small business in America and a viable option to consumers. Those who jumped on that bandwagon were very pleased to have an opportunity to participate actively in a new industry that would offer consumers an alternative to the single cable television provider allowed under their city's franchise. It took a very long time – approximately ten years – to develop equipment and market the service to the stage where some of the entrepreneurs could (at great risk in many cases) leave their day jobs and focus on the burgeoning new MMDS industry. Some folded; some sold out at varying prices; some held on long enough to begin showing a minor profit after such a lengthy and expensive investment – at least enough out of the red to have hope. From the inception of the new MMDS industry, small licensees have pioneered the development of MMDS equipment, services, policies, and procedures. They have struggled to create a commercially viable business with the investment of their lives, energies, time and finances for the past 20 years. It is therefore crucial as the MMDS industry moves into a new and exciting phase that these pioneering licensees not be cast aside.

II. TECHNICAL RE-STRUCTURING

Initially, the AMLC wholeheartedly supports the Commission's plan to de-interleave the ITFS and MDS band so as to group spectrum blocks in more functional clusters. We do question

²MMDS is obviously a subset of the larger MDS service. As used herein, MDS will refer to the field of MDS generally, including MMDS. Where the issues addressed apply only to MMDS, the latter term will be used.

the wisdom of the Wireless Coalition's plan to arrange the band so that all of the lower band is allocated to ITFS and all of the upper band is allocated to MDS. This arrangement effectively precludes all FDD operations in the band unless some of the ITFS spectrum is devoted to commercial use. As will be set forth below, we believe that the ITFS band should be restored and limited to its originally intended use: genuine educational purposes. Any commercial use of the band should be done by commercial MDS licensees rather than educators.

Even if that direct approach to restructuring the band is not adopted, the Wireless Coalition proposal necessarily puts all FDD use of the band on a secondary basis to ITFS use of the lower band for educational purposes. An MDS operator could never have 100% certainty that FDD operation will be possible because that application will depend on the initial and continuing good will, channel capacity and reasonableness of ITFS operators. It will be difficult to secure the capital investment and financing necessary to fund operations without long-term security about the availability of the spectrum. If the Commission continues to authorize commercial operations by ITFS operators, therefore, some of the MDS spectrum should be in the lower segment of the band as well as the upper.

Otherwise, we generally support the concept of de-interleaving the channel groups and concentrating high tower, high power operations in the center of the band, freeing the lower and upper portions for low power, cellularized operations. However, rather than compelling licensees to put part of their channels into the middle band and part into the other bands, we would relocate all continuing true ITFS usage to the middle band. MDS incumbents (both site-by-site and geographic) could elect to put channels into the high power cluster, but otherwise

this spectrum would be co	nfined to the low powe	r operations envisio	ned for the upper and lov	ve
bands.				

III. REGULATORY UNDERBRUSH

The AMLC supports the Commission=s proposal to eliminate the various unnecessary and unhelpful filings which MDS licensees must make. These include:

- A. The Form 430 Updates. MDS licensees currently must file an annual report per Section 21.11 of the rules verifying that their current ownership and legal qualification information is unchanged. Since the information rarely changes, hundreds of licensees find themselves filing letters certifying that there has been no change, letters which seem to be promptly misfiled in any case in the Commission's files. This effort and expense is wholly unnecessary. We presume that the planned elimination of Form 430 in favor of Form 602 will eliminate the need for repeated "no change" filings. We do observe, however, that certain legal qualifications information called for by Form 430 (status of criminal and antitrust litigation) is not called for by Form 602. If that information is deemed important, it could be requested on Form 602 on the same occasions that Form 602 must presently be filed or updated.
- **B.** 21.911 Report. As noted in the *NPRM* at para. 203, the annual filing of this report no longer serves a useful purpose. We believe it was originally intended to monitor the use of MDS channels for video usage versus data usage, but so far as we can determine, the Commission never reviews the data or uses it for any purpose. Moreover, as MDS/ITFS usage moves into a digital mode, it will become difficult, if not impossible, to report what content is being transmitted over "channels" of fluctuating definition. Particularly if the Commission moves to a "substantial service" standard as proposed *infra*, there will be no need for annual monitoring of channel-by-channel activity. This report imposes needless burden with no reward.

C. EEO Complaint Report.

On May 31 of each year, MDS licensees are required to file a report indicating whether any EEO complaints have been filed against them. (Sec. 21.307) This report is one of the few that actually seems to have some utility since it reports potentially significant allegations of wrongdoing. AMLC believes that EEO complaints should be reported to the Commission within 30 days of their occurrence, and notification of the final resolution of the complaint (whether positive or negative) should be provided in a similar timeframe.

D. Content Control Statement.

Many licensees file a "statement" annually pursuant to Section 21.920 indicating that they do not control the content of their transmissions and hence are not required to file an EEO report. It is unclear that such a statement is actually required, but the Commission should make clear which licensees must file EEO information and then consolidate that information on a single annual or biennial form.

E. Assignment and Transfer Consummation Period.

At paras. 166-169 of the *NPRM*, the Commission notes that the assignment and transfer application process could be streamlined, including expanding the consummation period to 180 days. In our experience, many, many transactions cannot be consummated in the 45 days presently allowed. This results in repeated requests to extend the consummation period which then require action by the Commission staff to give the extension. This is a waste of time for all concerned. Establishing a 180-day period consistent with the general ULS rule makes far more sense.

F. Tariffs.

When MDS licensees operate as common carriers, it appears that they are still required to file and maintain federal tariffs since they have never been determined by the Commission to be non-dominant. (See § 21.903(b) and (c).) In the present market, it is, of course, nonsensical for carriers wholly lacking any market power to file tariffs while telecommunications giants do not. The Commission should make it clear that MDS common carriers are exempt from the tariff obligations of Title II of the Act.

G. Fees.

The *NPRM* highlighted the fact that the current fee structure is skewed. Cellular and PCS licensees, for example, have a single call sign per market no matter how many individual station sites they have. Yet MMDS licensees operating in a cellular configuration have multiple licenses at multiple locations, with resulting huge regulatory fees and filing fees. One MMDS licensee found itself liable for over \$25,000 in filing fees simply to notify the FCC that an eight-site multi-channel system had been constructed. A comparable cellular or PCS filer would have had to pay nothing at all. Moving to a GSA (geographic service area) model would help a great deal in this regard, but in addition licensees should be permitted to consolidate station sites in single markets into a single license to avoid the need for multiple renewal and other call sign-based filings in the future.

There is also an inequity in permitting ITFS licensees to be "fee-free" on the grounds that they are non-commercial while requiring MDS licensees to pay substantial recurring fees.

(NPRM at Para. 184). In many cases, ITFS licensees are using 95% of their spectrum for purely commercial purposes – potentially in direct competition with MDS licensees – yet they are

relieved of a significant cost of doing business. To the extent that ITFS fees are not statutorily barred, the FCC should treat ITFS licensees operating commercially no differently than it treats their competitors.

IV. TREATMENT OF ITFS BAND

The Wireless Coalition Proposal was a product of compromise between large MMDS licensees, the ITFS Industry, and the Catholic Television Network. As a proposal which necessarily needed to accommodate the needs of all three groups, the Wireless Coalition Proposal could not squarely address the fundamental problem of the ITFS/MDS band: very little of it is actually used for educational purposes. The ITFS was originally conceived as a private delivery vehicle for educational TV programming for educational institutions. At paras. 109-112 of the NPRM, the Commission provided an excellent survey of the gradual reduction of the obligation to use ITFS for educational purposes which has occurred over the years. The reality is that ITFS for many licensees has simply become a means of generating revenue with barely a nod toward educational use of the spectrum. This development is best seen in the dichotomy between Section 74.902(d)(1) (which limits ITFS applicants to only the number of channels that they actually need for education) and Section 74.902(d)(2) which assumes that they need four channels as long as they use a minimal amount (now defined to be as little as five percent) for "genuinely educational purposes." In other words, an ITFS licensee need only use twenty percent of the capacity of one of its four channels for "genuinely educational purposes" in order to use the other three channels and 80% of the fourth for straight commercial enterprises.

It would be as though the government set aside four acres of land for educational use by schools and colleges, assuming that the land would be used for classrooms, playing fields,

laboratories and the like. Instead, the schools simply lease the land to commercial enterprises for office buildings, retain a few administrative offices in the high-rises for themselves, and then use the rent they reap to cover other expenses. The proceeds end up being used, we will assume, for educational purposes, but this is a clumsy, indirect and grossly inefficient way for society to subsidize education. The situation amounts to nothing more or less than an educational subsidy which is funded by MDS operators and their subscribers.

In our view, the existence of this subsidy makes no sense from a policy standpoint. One of the main initiatives of the Telecommunications Act of 1996 was to eliminate "hidden subsidies" which had long existed in the structure of the telecommunications marketplace. If we as a society believe a particular subsidy is justified by overriding societal purposes (*e.g.*, the subsidy of high cost rural telecommunications carriers), then society should acknowledge that the subsidy is needed and arrange to have all of the affected sectors share in the subsidy. This is exactly what the Universal Service Fund was created for. There is no reason why ITFS spectrum should continue to exist as a secret and unacknowledged subsidy when Congress has so strongly decreed its opposition to such arrangements. It is particularly unfair to lay the educational subsidy only on the backs of MDS operators when their main competitors – cable companies – are free from the obligation.

The no-nonsense solution to the ITFS situation is quite simple. ITFS licensees who use their spectrum for genuine educational purposes -i.e., who actually deliver educational material to students as the Commission originally intended - should keep their existing quantum of spectrum. ITFS licensees should be prohibited from leasing their channels for non-educational purposes or for profit. Licensees that are not using their spectrum for educational purposes

within one year of the effective date of the new rules would be required to return that spectrum, or that portion of it which is not used educationally, to the MDS pool. All remaining ITFS usage should then be consolidated in the middle of the band. (In many cases there will be only one channel of true educational usage, and that would be relocated, for example, to Channel E-1.)

The channels would be de-interleaved as proposed by the Wireless Coalition. This will permit tall tower, high power educational use to continue in the middle of the ITFS/MDS band, providing the separation needed for FDD operations in the upper and lower bands. In only rare instances, however, would we expect that more than six to twenty-four MHz of spectrum would end up being devoted to true educational purposes.

As a corollary to this reclamation of ITFS spectrum, the Commission would require that the eventual commercial users of presently vacant or reclaimed ITFS spectrum make available up to 20% of their capacity for educational purposes. In other words, rather than maintaining their own transmission facilities with all of the costs attendant thereon, educators could simply use without cost a small portion of the spectrum made available for commercial operators. This percentage of spectrum should be more than adequate to handle the Internet or program distribution requirements of educators while leaving most of the spectrum available for commercial usage. Devoting a portion of the commercial spectrum to educational use is a well-settled technique used by the Commission in the context of cable television and OVS public access channels. 47 U.S.C. 611; 47 C.F.R. § 76.1505. In addition, Direct Broadcast Satellite licensees are required to make available up to 4-7% of their transmission capacity for

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³ Eligible educational institutions would be those who have registered with the Commission as non-profits for regulatory fee purposes and who provide programming directly to enrolled students in the communities where the institutions are located.

educational or public access type service. 47 U.S.C. 335(b). The courts have found that such set asides pass constitutional muster. *Time Warner Entertainment Co., L.P. v. FCC*, 93 F. 3d 957, 975-77 (D.C. Cir. 1976). This approach ensures that additional channel capacity will always be available to educators for true educational purposes.

This solution has a number of salutary benefits:

- A. It preserves all existing educational use of the ITFS spectrum. Indeed, once they are prohibited from renting out their excess spectrum for non-educational purposes, educators might very well come up with new and creative ways to use it for true educational purposes.

 ITFS would be restored to its original, worthwhile use.
- B. It eliminates the hidden and unfair subsidy represented by spectrum lease payments. While a set aside of channel capacity on a commercial operator's system is also a form of non-cash subsidy, when a commercial operator buys the newly available ITFS spectrum, it will know that it is subject to the condition that some of it must be available for educational uses, and its auction bids will be adjusted accordingly. There is no unfairness to the new commercial licensees who acquire the licenses subject to that understanding.
- C. It eliminates all of the haggling about who will pay for ITFS relocation; to the extent that ITFS licensees actually use the spectrum they will just re-tune their equipment to the new channels at their own expense. In no other noncommercial service (such as public T.V. or public safety operations) does the Commission require other licensees in the area to pay operational expenses of noncommercial licenses. From a policy standpoint, ITFS licensees should be generating their own operation funding for all of their expenses just like everyone else.

- D. It frees up large blocks of spectrum for efficient commercial use. The reclaimed spectrum can be auctioned off, with the public treasury benefitting by the proceeds.
- E. It eliminates the cumbersome, artificial and increasingly unwieldy rules regarding commercial use of ITFS channels. Commercial channels would be commercial and educational channels would be educational. Period.
- F. It eliminates the present practice of ITFS licensees straining to transmit "educational" or quasi-educational material for the sole purpose of meeting FCC minimum requirements. If educators did not have a genuine educational reason to transmit over their channels, they would have no incentive to make one up. They would just stop transmitting and cancel their licenses rather than waste their own money.

While this proposal makes eminent sense, we can nevertheless expect howls to rise up from the parties who receive highly preferential treatment under the present system – those who get subsidies for renting out their spectrum for non-educational purposes. The answer is not to persist in preserving a historical mistake; the answer is to provide direct subsidies to education through the USF or other means. Such a funding mechanism would be shared in by all relevant segments of the industry and the population rather than just by MDS operators who happen to be electromagnetic neighbors of the affected frequency users.

V. LICENSING OF AVAILABLE SPECTRUM

Whether or not the plan outlined above to reclaim non-educational ITFS spectrum is adopted, the Commission will have presently unlicensed ITFS spectrum in its inventory to dispose of. We support the following regulatory scheme for licensing the former ITFS spectrum:

A. The ITFS spectrum should be licensed geographically on the same terms as the MDS spectrum.

This will permit the newly auctioned spectrum to be congruent with the comparable MDS spectrum which adjoins and surrounds it. As the MDS and ITFS bands converge, it is important that they cover the same territories so as to avoid confusing and inefficient overlaps. The MTA-size regions are manageable for both small carriers and large ones. This size promotes a market-by-market approach to use of the spectrum which we believe is healthy. We assume that arrangements with Rand-McNally similar to those reached for the initial MDS auctions can be worked out here.

B. The licenses should be auctioned by channel groups.

ITFS spectrum should be auctioned in the existing groups of four channels (or less, where channels have been retained by ITFS licensees who use the channels educationally). By making them available in discrete channel groups, the Commission can ensure that no licensee gets more spectrum than it really needs. In addition, by keeping the channel blocks at a reasonable size, the Commission will preserve the possibility of competing licensees rather than monopolies in each market.

C. The channels should only be available for commercial applicants.

Potential ITFS applicants have had almost thirty years to apply for and use the available ITFS spectrum. If they have not applied for it (or if they have held it but not used it for educational purposes) by now, there really is no need to continue to make spectrum available for ITFS needs. By contrast, there has been intense and growing demand for commercial use of this spectrum. As with the lower 700 MHz spectrum and FM translators, therefore, the Commission can avoid the potential problem of mutually exclusive commercial and non-commercial applications by restricting the potential bidders to commercial applicants.

D. The protected service area of incumbent licensees should be clearly defined.

The *NPRM* proposes to establish a 35-mile PSA or GSA around each main station. Para. 86. The *NPRM* leaves it unclear as to whether this 35-mile radius is defined by the main station=s existing location or its location as of September 15, 1995. (The present PSAs became fixed as of that date, but licensees could change location within that 35-mile radius.) The AMLC supports establishing the PSA/GSA by reference to the present location (or presently proposed location, if an application is pending) since this will more accurately reflect present reality. New filers and incumbents alike can make interference analyses by reference to present site data

rather than a legal fiction maintained since 1995. AMLC supports the concept of making the PSA a GSA within which transmitter sites could be placed and moved without the need for further FCC authorization.

E. Splitting the football.

The AMLC agrees that "splitting the football" is an appropriate way to handle overlapping PSAs. There is a real value in establishing clearly who has the rights to operate in which territories. Splitting the difference, while not ideal, provides a rough justice solution. While a few existing receive sites will inevitably fall on the wrong side of the demarcation point, the elimination of uncertainty will ultimately work to the benefit of all existing and potential receive sites. At the same time, adjacent licensees should be allowed to arrive at a consensual division of the overlap areas in order to preserve existing service patterns or take into account terrain features which make simply splitting the football impractical.

F. Underlays are likely to cause interference

The Commission is considering the use of unlicensed frequency underlays in many contexts, but the feasibility of underlays remains an untested proposition. We have concerns about the implementation of unlicensed services on any kind of broad scale. Though such services would be on a strictly non-interfering basis, it would be very hard indeed for the Commission to shut down service to hundreds or thousands of subscribers if their unlicensed operation was merely degrading the signal of the licensed operators and their subscribers. Yet some degradation of service is almost certain to occur, and often under circumstances where the source of the interference will be difficult to identify. The result must inevitably be a loss of confidence in the reliability of licensed wireless operations. This problem is particularly inequitable for licensees who paid substantial amounts of money for the rights to this spectrum,

only to be told that the FCC is now considering giving away that same spectrum for free to newcomers. We therefore strongly oppose the authorization of underlays at this time – especially when so much unlicensed spectrum is being made available elsewhere in the electromagnetic band.

VI. AUCTION STRUCTURE

The method of reshuffling the presently licensed MDS and ITFS channels, and auctioning previously unlicensed or reclaimed ITFS spectrum could be a first opportunity to use auctions both to efficiently clear the band and to award the licenses to the company who will put it to the best use. The Wireless Coalition proposed a complicated plan in which a "Proponent" of de-interleaving would trigger the process of vacating channels and relocating, with a complex system of proposals, counterproposals, and negotiations over who would pay for what. In addition, the initiation of the new channel structure in one market would also require adoption of the new structure in adjacent markets, with the possibility that conflicting daisy chains of plan proponents would become hopelessly ensnarled. That system is unworkable from a practical and structural standpoint. It will inevitably degenerate into a welter of disputes which will have to be resolved by the Commission or the courts. If the restructuring of the MDS/ITFS band is to occur in any sort of orderly and prompt way, it must be accomplished with simplicity and certainty; it must address relocation expenses and burdens; and it must not saddle any one group of licensees with disproportional burdens.

In our view, the best way of resolving all of these issues quickly and fairly is the two-sided auction concept floated by the Commission in the NPRM. Here is how we envision that the process might work:

- A. The Commission would determine which ITFS channels are available, either because they are currently vacant or because they have been reclaimed due to non-educational use as proposed above. Under delegated authority, the Bureau would then relocate/relicense the current educational users to channels in the middle of the ITFS/MDS band. At the completion of the process, the quantum of former ITFS spectrum available in each market would be known.
- B. The entire ITFS/MDS band (less the channels licensed to existing genuine educators) would then be auctioned according to the present ITFS/MDS four-channel groups (A, B, C, D, E, F, G and H). (The H group would have only three channels and some of the ITFS groups might have fewer than four channels because they are being used for genuine educational purposes.) In the ensuing auction, existing incumbent MDS and ITFS licensees would bid with virtual dollars. If they elect to retain their licenses, they could simply outbid any other bidder for their channel block; in that case they would retain their existing license. If they permitted themselves to be outbid, they would receive the amount bid for their license and forfeit any further rights to their license. Thus, a bidder who truly desired a market could clear the band of all incumbents by simply bidding a high enough price. It would then have no obligations to pay for any relocation costs and would have unencumbered spectrum to work with. In addition, incumbent licensees who retain their spectrum would be consolidated, thus permitting aggregation of the maximum amount of useful contiguous spectrum by the auction winner. This plan has the following advantages.
- 1. The timing of the transition from the old band plan to the new would be driven and controlled by the auction winners. The actual changes in licenses would become effective shortly after the completion of the auction process. The auction winners could construct in the new band plan according to their own business plans; the remaining ITFS

licensees and MDS incumbents in each market who did not sell out would transition on their own timetable at their own expense. The auction winners could therefore roll out various markets on their own timetable without obstruction by, or negotiation with, incumbents. By the same token, incumbents would know exactly where they stood, would vacate their present frequencies and then relocate at their own expense, and would not have to argue about and pay for other people's relocation expenses.

- 2. As indicated, there would be no squabbling about who pays what relocation expenses. The auction winners would pay no relocation expenses and the incumbents would bear their own. We note that under the "substantial service" proposal, incumbents who did not wish to incur the costs of transitioning immediately would not have to do so. Licensees who do wish to transition could do so as soon as the auction is over; non-transitioning licensees would only have the obligation to provide substantial service on their new frequency assignments prior to the end of their license term. This ensures that smaller licensees would be able to transition at their own pace while maintaining the obligation to put their licenses to substantial use during their license term.
- 3. The removal of MDS licensees would be fair. Incumbents who sold out in the auction could not complain since they would have voluntarily received fair value for their licenses. Incumbents who do not sell out are presumably serious operators who intend to use their spectrum productively. The market thus works to clear the MDS spectrum efficiently.
- 4. The Treasury would get the benefit of the auction proceeds for the new and reclaimed ITFS channels. Ideally, the Commission should earmark the proceeds of these (and other) auctions as FCC-generated funds. Rather than going into the general federal

treasury, the proceeds could be used to offset amounts which would otherwise be due as annual regulatory fees from licensees.

- 5. The Commission would not have to worry about relocating any licensees to some portion of the spectrum outside the ITFS/MDS band.
- 6. The result of the plan is that many incumbent licensees would be happily gone. In addition, the incumbents who retain their licenses would be consolidated to facilitate the use of the remainder of the band by the auction winner. In the past, the development of MDS operations has been crippled by the need to get the consent of neighboring co-channel and adjacent-channel licensees before any commercially viable operations could proceed.

 Neighboring licensees would often be uncooperative or just plain obstructive in supplying the necessary consents, even when real-world interference was highly unlikely. By grouping the remaining incumbents together, the need for the auction winner to obtain multiple consents is minimized. The new licensees would immediately have clear, contiguous upper and lower band spectrum to work with.

To make the auction work properly, several refinements are necessary. Since each BTA would have both incumbent site-by-site licenses as well as geographic licenses, bids placed for each channel block in each BTA would have to specify bids for the incumbent license and/or the geographic license. A bidder should be allowed, however, to indicate combinatorially that it would not be deemed the winning bidder on any channel block in any market unless it was the high bidder for both the incumbent and the geographic license. This will permit bidders to acquire full unencumbered rights to the channel blocks in each BTA without the risk of ending up with useless bits and pieces.

Second, any geographic licensee whose license was acquired would be relieved of future obligations on installment notes. Obviously, a licensee should not have to pay for a license of which it has been divested. To the extent that the winning bidder=s bid is less than the outstanding amount of the installment note, the winning bid would be paid directly to the FCC and the incumbent would receive nothing.

Third, the Commission should retain the eligibility restrictions which currently promote competition in the wireless broadband field. As restructured, the ITFS/MDS band has the potential to emerge as a true competitor to cable and ILEC DSL broadband delivery systems. To avoid having it be snuffed out by acquisition by potential competitors, the current restrictions on cable/MDS ownership should be maintained and, indeed, expanded, to include ILECs which offer broadband or video. At the same time, the Commission should re-double its efforts to foster small business/minority/female-owned licenseeship, as required by Congress when it established the auction program.

VII. ONGOING OBLIGATIONS

The constant restructuring of the MDS/ITFS rules has led to a long-standing stasis in the industry. Neither equipment vendors, nor financing institutions, nor licensees and operators themselves, are willing to invest large amounts of capital or development costs in a service which is on the verge of changing dramatically. MDS has historically been an industry which is about to happen, but which never quite makes it there. The presently proposed radical restructuring of the spectrum band and licensing methodology is the best prospect yet for realization of MDS's potential. But again, unfortunately, the industry must tread water until the new rules go into effect.

The Commission has wisely acknowledged this practical reality by granting a blanket extension of time to construct facilities with outstanding build-out deadlines. However, the Commission neglected to address the problem of continued operation. Because it would be unrealistic to hook up new subscribers to an MDS network which is likely to be re-vamped entirely in the next 8-10 months, most licensees have been forced to suspend any growth in subscribership and in some cases suspend operations altogether. Licensees in this quandary should not be penalized.

The problem is that Section 21.303 of the rules requires licensees to offer service to customers at least once a year. Arguably, a licensee wanting to deploy an advanced system under the rules now under consideration would nonetheless have to continue providing service to at least some legacy subscribers or risk forfeiture under Section 21.303. It makes no sense to compel uneconomical and inefficient service to be provided simply to meet FCC rules. There is no comparable rule for PCS service. The Commission should simply abolish Section 21.303. Licensees will have their own strong financial incentives to make the best and most productive use of their licenses. Instead, the Commission should employ the more modern regulatory model for MDS licensees: require them to provide substantial service to their licensed areas by the end of their license term.

In Extension of the Five-Year Build-Out Period for BTA Auction Holders in the Multipoint Distribution Service, 16 FCC Rcd 12593 (2001) ("Build-Out Extension Order"), the Commission recognized that the pendency of changes in the MDS landscape rendered it virtually impossible for MDS BTA licensees to build out their systems in the manner contemplated by Section 21.930 in the time period available. The Commission therefore extended the build-out deadline first by two years and then until some time after the conclusion of this rulemaking. The

Commission did not, however, suspend the obligation for BTA installment note holders to make payments on their notes. The fact of the matter is that many such obligors have been making payments for years but without the ability to put their investment to productive use due to the constant changes in the MDS landscape. Since the Commission has already determined that the present uncertain posture of the industry justifies waiver of the build-out deadline, the same considerations should justify suspension of the MDS note payment schedules. This was precisely the relief granted to PCS C Block installment note holders when that industry went into a tailspin and industry-wide relief was needed. Second Report and Order and Further Notice of Proposed Rulemaking, Amendment of the Commission's Rules Regarding Installment Payment Financing for PCS Licenses, 12 FCC Rcd 16436 (1997). The Commission itself has acknowledged that the MDS industry is depressed (NPRM at Para. 27) a fact which has been confirmed most recently by the bankruptcy of two major MDS licensees. If these carriers are toppling under the burden of FCC and other debt, how much greater must be the burden on small carriers without the access to financial resources which the big carriers have? The Commission should therefore suspend the BTA payment schedule for note obligors for a period of two years or until the transition to the new order becomes effective.

In this regard, the Commission=s *Build Out Extension Order* left open a number of unanswered questions. It remains unclear how an MTA licensee can serve two-thirds of its MTA population if it excludes the population served by the incumbent. (§ 21.930(c)(i).) In many cases, the highest concentration of population is within the PSA served by an incumbent. The remaining population is widely scattered and far more difficult to serve. Indeed, in some cases the need to protect incumbents makes it impossible for the MTA licensee holding the rights to the remainder of the market to serve more than two-thirds of the remaining population.

The coverage requirement should be reduced to one-fourth of the population – or a "substantial service" showing as permitted by the PCS rules (Section 24.203).

The Commission should also clarify whether the coverage requirement must be met by the entirety of the spectrum allocated to a licensee or to any of the spectrum so allocated. Under the mobile services model, a licensee never covers the entirety of its market with all of its channels because they are directed and re-used in a cellular fashion. The coverage rules therefore clearly only require that the designated fraction of the population be covered by some of the licensee's spectrum, not by all. Given that MDS is anticipated to operate in a similar cellularized mode with dynamic channel use and re-use, the mobile model should be applied here: as long as one-fourth of the GSA is included in the licensee=s actual service area, it should not matter how much spectrum is being used in that area.

One subject not touched on in the *NPRM* is whether or when MDS licensees could become Commercial Mobile Radio Service (CMRS) providers. Under the new flexible use permitted for MDS/ITFS spectrum, licensees could conceivably use it in a way that would fall within the statutory definition of commercial mobile radio service. See 47 C.F.R. 20.3. Taking on that regulatory classification has certain legal consequences. For example, state regulators are divested by Section 332(c) of the Act from any authority to regulate CMRS rates; there is no such restriction on non-CMRS MDS rates. In addition, annual regulatory fees and other FCC rules are triggered by CMRS or non-CMRS status. Just as licensees must declare themselves common carriers or non-common carriers, it would be useful for them to declare themselves

CMRS or non-CMRS. This self-categorization will help consumers and regulators alike to know what regulatory scheme applies at any given moment.⁴

VIII. EXISTING LEASES

As a product of historical circumstance, the MDS/ITFS world is presently entangled in a web of lease agreements, many of which are for long terms. ITFS licensees have leased their excess capacity; MDS licensees have leased their capacities. In virtually all cases, these leases contemplate operation on certain channels under the model which prevailed in the industry for the last 25 years. Under the de-interleaving plan, MDS licensees will be left in a position where the licensee will have less spectrum than they contracted to deliver and at a different frequency than they originally had. MDS lessees will be getting a wholly different frequency and power than they contracted for. Moreover, the whole surrounding regulatory paradigm will have dramatically changed because the eligible uses of MDS and ITFS will have dramatically expanded.

In the absence of guidance from the FCC, the continued status of these contracts is likely to be the subject of enormous confusion and litigation. It could reasonably be argued that a contract for one frequency or one bandwidth is not the same as a contract for another, and the contract must therefore be rescinded. On the other hand, it could be argued that if comparable spectrum is substituted for the original spectrum, the parties should remain bound by the original contract. This issue is bound to spawn hundreds of lawsuits in hundreds of different jurisdictions around the country. All of the intended benefits of the restructuring proposed in this Docket will

⁴Of course, any such self-definition is subject to objective overruling if the actual facts of operation differ from the claimed regulatory status.

be lost if four or five years are spent in jurisdiction after jurisdiction determining whether leases from the old paradigm apply or not.

While the Commission normally avoids intruding into contractual relationships, it has not hesitated to require modification of contracts in appropriate circumstances. For example, in *Amendment of Parts 1, 21 and 74 to Enable MDS and ITFS Licensees to Engage in Fixed Two-Way Transmissions*, 13 FCC Rcd 19112 (1998), *modified*, 14 FCC Rcd 12764 (1999) ("*Two-Way Order*"), the Commission adopted rules which significantly affected provisions common to ITFS leases. The Commission declared that certain types of provisions were either valid or invalid, and lessors and lessees conformed their leases to comply with the new requirements. The industry is also somewhat unusual in having contracts of considerable length (15 years is the customary number, including renewals). The normal process of contract attrition over a three to five-year life cycle which prevents rule changes from causing problems in other FCC regulatory fields does not apply here.

To disrupt existing contracts as little as possible while preventing mass confusion and litigation, the Commission should ordain that leases pre-dating the new rules may not be renewed for additional terms, and that any existing term longer than three years is presumptively unlawful. If both parties to the contract re-ratify it after the new rules come into effect, a longer-term contract could continue. But otherwise, the assumption should be that the underlying premise of the contract is so altered that the contract cannot be deemed to have further effect. This would leave the parties free to negotiate new contracts under the new regulatory regime without the need for further intervention.

Another problem often faced by licensees is that lessees enter into long-term lease arrangements for use of 100% of the spectrum and then simply warehouse the spectrum. The

licensee is powerless to force the lessee to put the spectrum to productive use, nor can it re-let

the spectrum to another operator. Yet at the same time the Commission appears to hold the

licensee responsible for the non-use of the spectrum. *Hydra Communications*, DA 03-697, rel.

March 14, 2003. This is an increasingly common problem as lessee/operators fold up their

businesses – sometimes by simply disappearing but other times by ceasing operation but

retaining their rights to the spectrum with minimum payments. The Commission should require

that lessees who have exclusive use rights to MDS or ITFS spectrum must put it to actual use

within some reasonable period of time or terminate the lease.

IX. CONCLUSION

For the reasons set forth above, the Commission should adopt the rulemaking proposals

outlined in the NPRM with the changes noted above. Because continued uncertainty can only

cast a pall over the industry while rulemaking proceeds, AMLC urges the Commission to bring

this proceeding to conclusion as quickly as possible.

Respectfully submitted,

The Ad Hoc MMDS Licensee Consortium

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